

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)

O. MARK MARQUEZ)
Bar No. 001627)

RESPONDENT.)

No. 01-0370

DISCIPLINARY COMMISSION
REPORT

This matter first came before the Disciplinary Commission of the Supreme Court of Arizona on October 19, 2002, pursuant to Rule 56 Ariz. R. S. Ct., for consideration of the Tender of Admissions and Agreement for Discipline by Consent (Agreement) and Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memo) filed August 7, 2002, providing for a sixty-day suspension, a written apology to the Complainant, one year of probation with the Member Assistance Program (MAP), and costs. The Commission requested oral argument. The State Bar, Respondent, and Respondent's Counsel were present.

On October 29, 2002, the Commission filed an Order for Modification of Agreement pursuant to 56(b), Ariz. R. S. Ct., and requested that the parties file an amended Agreement and amended Joint Memorandum reflecting censure, a written apology to the Complainant, one year of probation (MAP) and costs. The Commission determined that given the limited evidence present in the record and a proportionality analysis of other cases involving a conflict of interest resulting from sexual misconduct that a sixty-day suspension seemed overly harsh and perhaps censure would be a more appropriate sanction.

1 Thereafter, the State Bar rejected the proposed modification and informed the Respondent
2 of its intent to proceed to formal hearing.

3 On November 14, 2002, Respondent filed a Motion to Reconsider and requested
4 that the Commission modify its Order and consider an amended Agreement providing for a
5 thirty-day suspension and one year of probation with the previously stated terms.
6 Respondent stated that he did not want to prolong the final disposition of this matter as it
7 weighed heavily on his mind and furthermore, he did not want to open himself to the
8 possibility of receiving an even harsher sanction. Respondent also expressed concern that
9 any additional delay could affect his commencement of an acceptable MAP contract.

10 The State Bar did not object to the motion and by Order filed November 20, 2002,
11 the Commission requested that the parties file an Amended Agreement and Amended Joint
12 Memorandum in support of the proposed thirty-day suspension. The Commission further
13 requested that the parties file any additional evidence not previously submitted to justify the
14 appropriateness of the proposed sanction, and to distinguish the instant matter from
15 previous cases involving misconduct of a sexual nature which ultimately resulted in an
16 imposition of censure, specifically, *Matter of Walker*, 200 Ariz. 155, 24 P.3d 602 (2001),
17 *Matter of Piatt*, 191 Ariz. 24, 951 P.2d 889 (1997), and *Matter of Moore*, SB-02-0043-D
18 (2002).

19 On February 4, 2003, the State Bar filed an Amended Agreement and Amended
20 Joint Memorandum and the matter was scheduled for consideration on March 7, 2003.
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Decision

1 The nine¹ members of the Commission by majority of seven² recommend accepting
2 and incorporating by reference the First Amended Tender of Admissions and Agreement for
3 Discipline by Consent and First Amended Joint Memorandum in Support of Tender of
4 Admissions and Agreement for Discipline by Consent providing for a thirty-day suspension,
5 a written apology to the Complainant, one year of probation (MAP) and costs for violating
6 ERs 1.7, 8.1(a) and 8.4(d).
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8 The Commission majority is persuaded that the amended Agreement provides
9 factual support for the agreed upon sanction and that a thorough proportionality analysis
10 was presented by the parties in the First Amended Joint Memorandum.
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12 While the *Piatt*, *Walker* and *Moore* cases involved unwelcome sexual comments,
13 and *Walker* and *Moore* involved unwelcome touching, Respondent's conduct went beyond
14 the type of conduct in those three cases. Unlike the attorneys involved in *Piatt*, *Walker*, and
15 *Moore*, Respondent persisted in the face of the Complainant's repeated and forceful
16 rejections of his advances, he falsely denied the Complainant's allegations, and he engaged
17 in unjustified attacks on the credibility of the Complainant.
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19 When Respondent grabbed the Complainant in a "bear hug" from behind during their
20 first meeting, she forcibly pulled away from him. First Amended Tender of Admissions and
21 Agreement for Discipline by Consent ¶ 9. He asked her to lunch twice, which she declined,
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24 ¹ Commissioners Guitierrez and Nelson did not participate in these proceedings. One
25 attorney member seat remains vacant. Donald H. Bayless, Jr., Jack L. Potts, M.D., and
26 Maria Hoffman participated as ad hoc members.

² Commissioner Carson and Dr. Potts recommended rejection of the Agreement and
dissented. Both believed that censure was appropriate.

and made comments about how attractive she was. *Id.*, ¶ 8. Had the misconduct ceased at this point, this case might be analogous to the fact situation in *Moore*. The conduct from this point forward differentiates Respondent's behavior from Moore's.

After the second invitation to lunch, the Complainant told him to "leave her alone and that her dog was in the car and would attack him if he kept touching her." *Id.* During their second meeting (which the Complainant tape-recorded), Respondent approached the Complainant from behind and again gave her another "bear hug." The Complainant said "no". *Id.*, ¶ 10. His response was that Ransom (Complainant's dog) is not here, so I can touch you." This statement demonstrates that he 1) clearly heard her request and 2) understood that she had directed him not to touch her. Unfortunately, this did not thwart his improper advances.

The Complainant then made a third request, explicitly asking Respondent to please take his hands off of her. *Id.*, ¶ 12. Respondent's response was "I am going to get you some money." *Id.* This suggests that he was willing to put his own interests ahead of his clients' interests, perhaps convincing them to agree to a settlement on her terms if only she would endure his advances.

The Complainant made a fourth request and told him to take his hands off of her. *Id.* Respondent said he would not do so. *Id.*

Respondent's misconduct of physically restraining a woman against her will, after four explicit requests that he not touch her, went beyond mere insensitivity - it bordered on a criminal act. The aggravating factors of multiple offenses and pattern of misconduct are certainly supported by these admitted facts.

Respondent's misconduct did not end here. When the Bar asked for a response to the allegations of misconduct, Respondent stated that he never touched the Complainant and called her reaction "hysterical." *Id.*, ¶ 15. He also asserted that the Complainant was "mentally ill" and that she dressed inappropriately in very "revealing shorts." *Id.*, ¶ 19. He altered his statements only after listening to the Complainant's tape recording of the incident. The personal attacks on Complainant's mental condition and her manner of dress constitute additional offensive behavior that victims of sexual harassment should not be expected to endure from anyone and certainly not a member of the legal profession. It also constituted the submission of false evidence to the Bar during its investigation, which Respondent had admitted as both a violation and as an aggravating factor. First Amended Joint Memorandum, pp. 4-5; First Amended Tender of Admissions, p. 9, ll. 11.

The Commission was quite concerned about proportionality and fairness. The Respondent urged the Commission to accept this agreement. He is represented by able counsel, who has evaluated the evidence the State Bar would present if this matter went to a hearing. The majority is now persuaded based on the facts admitted in this case, that a suspension is warranted, and that this sanction will serve the purposes of discipline.

DATED this 7th day of April, 2003.


Jessica G. Funkhouser, Chair
Disciplinary Commission

Commissioners Carson dissenting:

I strongly dissent from the Disciplinary Commission's 7-2 vote to suspend O. Mark Marquez. Censure is the appropriate sanction and it is proportionally consistent. The

majority's decision to suspend Respondent was skewed by his intense desire to get the case behind him, and by the Bar's unwillingness to accept anything other than a suspension.

Originally, the parties submitted a consent agreement providing for a 60-day suspension. The Commission rejected the proposal, suggesting instead a censure. When the matter was returned with a 30-day suspension, the Commission sent it back again, saying the sanction would be reconsidered if the Bar could justify that the suspension was fair, equitable, proportional and necessary to protect the public.

In the end, the majority approved an agreement that is notable for its disagreement. The parties differ in their characterization of Respondent's conduct, and they also are in dispute over five aggravating factors and two mitigating elements.

Three previous judgments, *In re Piatt*, 191 Ariz. 24, 951 P.2d 889 (1997), *In re Walker* 200 Ariz. 155, 24 P.3d 602 (2001) and *Matter of Moore* SB-02-0043-D (2002), are cited in the proportionality analysis. Moore is closest in anecdotal matter.

An examination of the Marquez and Moore cases suggests a double standard. In Marquez, the Bar gave no credit to an otherwise spotless 38-year record, while in Moore the Bar cited as mitigation his lack of prior discipline during 30 years of practice.

In Marquez, the Respondent and Complainant met twice during regular office hours. In Moore, the respondent embraced a domestic relations client whenever she arrived or departed his office, and he telephoned her on at least three occasions to ask that she meet him at his office before or after business hours. Nonetheless, the Bar lists pattern of misconduct and multiple offenses as aggravating elements in the Marquez case. The Moore-

client contacts were more frequent, yet the Bar did not use the pattern of misconduct or multiple offenses as aggravating factors.

In Marquez, the Bar describes what was either a bear hug or a back rub as "unauthorized physical restraint," and the "restraint" occurred twice. In Moore, the physical contact was referred to as "embracing," and although the number was not recorded, the tender says he embraced his Client whenever she arrived or departed.

Some other contrasts:

In Marquez, the Respondent twice engaged in "unsolicited conversation," and invited the Complainant to lunch. Moore questioned his client "about personal matters of a sexual nature," asked to see her breasts before and after possible breast augmentation and sought at least three off-hours office visits.

The memorandum submitted in support of the agreement here says: "Unlike Moore, Respondent forcibly held Complainant against her will." It also says, "Complainant was subject to the unwelcome touching of her person by Respondent." At the same time, the Bar totally ignored the fact that Moore's embraces of his Client also were forcible and unwelcome.

Another questionable element is the Bar's decision to accuse the Respondent of knowing misrepresentations. The Respondent did deny the allegations when they were made approximately 10 months after the fact. Subsequently, he acquired his own attorney (a former Superior Court judge acting pro bono), and after a poor-quality tape recording of one Respondent-Complainant conversation was presented, he agreed that his words and actions were inappropriate.

1 In other cases with similar circumstances, bar prosecutors have credited respondents
2 with cooperation after legal representation was obtained. This prosecution is different in
3 that no such credit was given after Marquez obtained counsel.

4 Something is cockeyed and out-of-balance when similar cases have such different
5 outcomes.


6 *Donald W. Carson / mps*
7 Donald W. Carson, Commissioner

8 **Ad Hoc Member and former Commissioner Potts dissenting:**

9 There is little to add to Commissioner Carson's comments except that I also believe
10 the embarrassment and shame Mr. Marquez has expressed has led to the commission
11 wishing to have closure by accepting the disproportionate sanction. One should not
12 minimize inappropriate boundary issues, especially with clients, where there is a built-in
13 inequality in the relationship. My profession has been aware of the potential for such
14 problems for far longer than has the bar. Being a 'counselor' at law is significant and can
15 lead to confusion on the parts of all when boundaries are not respected. Mr. Marquez is an
16 "old dog." He needs to learn new tricks and is obviously capable of doing so. As it is in
17 medical schools, sensitivity training on these issues needs to be standard in the law school
18 curricula when training future counselors and attorneys at law. The fact that Mr. Marquez
19 accepts responsibility, cooperated with bar counsel, and is not arguing for a lesser sanction
20 as well as his excellent and unblemished record of practicing law should be considered as
21 mitigating.
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24 The point that the victim in this case was not his client but was his adversary acting
25 in propria persona should also be noted. Cases like *In re Piatt* 191 Ariz. 24, 951 P.2d 889
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(1997), and *Matter of Moore*, SB-02-0043-D (2002), are far more egregious, as are other public cases that have not been prosecuted.


Jack L. Potts, M.D., Ad Hoc Member

Original filed with the Disciplinary Clerk
this 7th day of April, 2003

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/mps